SUPREME COURT, U. S.

In the Supreme Court of the United States

October Term, 1972

No. 72-1318

ARTHUR KRAUSE, Administrator of the Estate of Allison Krause, Deceased, *Petitioner*,

vs.

GOVERNOR JAMES RHODES, SYLVESTER DEL CORSO, and ROBERT CANTERBURY, *Respondents*,

and

ELAINE B. MILLER, Administratrix of the Estate of Jeffrey Glenn Miller, Deceased, *Petitioner*,

vs.

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY D. JONES, JOHN E. MARTIN, RAYMOND J. SRP, ALEXANDER STEVENSON AND VARIOUS OFFICERS AND ENLISTED MEN AND ROBERT WHITE, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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The Petitioners, Arthur Krause and Elaine Miller, request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit (and the order denying rehearing), affirming the judgment of the United States District Court, for

the Northern District of Ohio, Eastern Division, which dismissed the amended complaint of petitioner Krause and the complaint of petitioner Miller in this action against all defendants.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not yet officially reported. It was included in the appendix of the Petition for Writ of Certiorari in the case of Sarah Scheuer vs. James Rhodes, et al., United States Supreme Court Case No. 72-914, at pp. 1A-69A therein. The decision of the United States Court of Appeals for the Sixth Circuit was rendered in Krause v. Rhodes, et al. and Miller v. Rhodes, et al. (Nos. 71-1622 and 71-1623, 6th Cir.), which were consolidated along with the Scheuer case into one opinion by the United States Sixth Circuit Court of Appeals and by the United States District Court, and therefore the present Petition for Writ of Certiorari on behalf of petitioners Krause and Miller does not contain that lengthy opinion in its appendix, but incorporates it by reference to the Scheuer Appendix. The Judgment Entries of the Sixth Circuit Court of Appeals is printed in the appendix of this Petition at pp. 28-31.

The opinion of the District Court has not been reported. The District Court's Memorandum Opinion and Order is included in this appendix at page 34.

Because these cases were denied on motions to dismiss directed at the face of the complaints, a copy of their texts is included in the appendix, the amended complaint in Krause at page 47 and the complaint in Miller at page 52; the texts are of particular importance in reading this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 17, 1972. On January 3, 1973, the Petition for Rehearing requested by petitioners Krause and Miller, which was timely filed, was denied by the United States Sixth Circuit Court of Appeals. (The order denying the Petition for Rehearing is reprinted in the appendix of this petition at page 32). This Petition for Writ of Certiorari is filed within the ninety (90) days after that date. The jurisdiction of the United States Supreme Court is invoked under Title 28, United States Code, §1254(1).

QUESTIONS PRESENTED

1. On a defendant's motion to dismiss a complaint based solely upon the sufficiency of the allegations of that complaint, may a trial or appellate court assume as true factual matters which are contrary to the allegations of that complaint?

2. Does the Eleventh Amendment bar a damage action brought against the Governor of Ohio, and against generals and officers of the Ohio National Guard in their individual capacities while acting under color of state law for the intentional deprivation of constitutional rights under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983, which neither names the state of Ohio as a party defendant, nor seeks to recover any damages payable through the treasury of the state of Ohio or through any public funds?

3. Does any doctrine of executive immunity bar a damage action against the Governor of Ohio and against

generals and officers of the Ohio National Guard acting in their individual capacities, individually and in conspiracy, under color of state law for the intentional deprivation of constitutional rights under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983?

4. Where citizens of Pennsylvania and New York bring damage actions in federal court against the Governor of Ohio and against generals and officers of the Ohio National Guard, these defendants all being citizens of Ohio, for committing individually and in conspiracy the wanton killing of innocent students on a college campus, and where an Ohio statute (Ohio Revised Code §5923.37) specifically provides for liability under such circumstances, does a federal court have jurisdiction based upon the diversity of citizenship of the parties?

5. Is the United States a necessary party in a damage action brought against the Governor of Ohio and against generals and officers of the Ohio National Guard in their individual capacities alleging that these defendants, acting individually and in conspiracy under color of state law, committed intentional deprivations of constitutional rights under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

1. United States Constitution, Amendment XI:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State. . .

2. Section One of the Civil Rights Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Jurisdiction in the United States District Court was premised upon 28 U.S.C. §1343(3) and (4), which provide:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

4. Ohio Revised Code §5923.37 (officially set forth in Baldwin's Ohio Revised Code Annotated, Vol. 7 at p. 21), reads as follows:

> "When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act

performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

STATEMENT OF THE CASE

Petitioners filed separate complaints in the United States District Court, for the Northern District of Ohio, Eastern Division. These pleadings are self-explanatory (see appendix page 47 for the Amended Complaint in Krause and the appendix page 52 for the Complaint in Miller). Named as defendants in the Amended Complaint of Krause were Governor James Rhodes, Sylvester Del Corso and Robert Canterbury. Named as defendants in the Complaint of Elaine Miller were James Rhodes, Sylvester Del Corso, Robert Canterbury, Harry D. Jones, John E. Martin, Raymond J. Srp, Alexander Stevenson and Various Officers and Enlisted Men and Robert White. Defendants in each case filed motions to dismiss. These two cases and a third, the case of Sarah Scheuer v. James Rhodes, et al. (Petition for Writ of Certiorari, United States Supreme Court, Case No. 72-914) were consolidated for purposes of determination of the motions to dismiss by the District Judge. The United States Sixth Circuit Court of Appeals also treated the three cases together despite differences of counsel and some differences in the causes of actions that were raised. After disposition in the Court of Appeals, counsel in the Scheuer case promptly filed for certiorari while counsel for Krause and Miller instead moved for rehearing by the United States Sixth Circuit Court of Appeals. A request for rehearing *en banc* was made.

The jurisdiction of the District Court was invoked as to the first cause of action alleged by Krause and by Miller because the claim arises under an Act of Congress, Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983 and under the equal protection and due process clauses of the United States Constitution. The jurisdiction of the District Court was invoked as to a second cause of action stated in the Amended Complaint of Krause and in the Complaint of Miller on the basis of diversity of citizenship, Krause and Miller being citizens of Pennsylvania and New York respectively and all of the defendants being citizens of Ohio.

The complaints allege facts which, if true, would establish claims under Title 42 U.S.C. §1983, and claims for wrongful death under Ohio Revised Code §5923.37, providing that no doctrine of privilege or immunity were established in bar. Respondents did not answer the complaints in either case. Instead they filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The motion to dismiss was granted by the District Court on June 2, 1971, and Krause and Miller (as well as Scheuer) separately appealed to the United States Sixth Circuit Court of Appeals. That court treated the cases together in reaching the judgment now raised for review.

Both the District Court and the United States Sixth Circuit Court of Appeals held that these damage suits against state officials, based upon alleged acts in violation of the United States Constitution and to which a state was not a party of record (and against which no monetary recovery was sought) were in substance suits against the State of Ohio itself and thereby barred by the Eleventh Amendment. In addition, the United States Sixth Circuit

Court of Appeals held that even if the case could be found as one against individuals, the defendants enjoyed the defense of absolute personal immunity or privilege, equivalent to that enjoyed by judges which could be invoked to bar any suit such as the one brought by Krause and Miller. While the District Court based its opinion in part on supposed facts contrary to the allegations of the complaints, the United States Sixth Circuit Court of Appeals went even further, elaborating a few of the facts derived from news media, and accusing the lawyers who had drafted the complaints, of deliberately attempting to deceive the courts. Neither the District Court nor the majority in the United States Sixth Circuit Court of Appeals gave any consideration to the diversity claims of these petitioners as distinguished from their claims under U.S.C. Title 42, §1983. In his comprehensive dissent Judge Celebrezze specifically noted each of the errors in the majority opinion of the United States Sixth Circuit Court of Appeals, including the neglect of the diversity claims.

REASONS FOR ALLOWANCE OF THE WRIT

I. ON A DEFENDANT'S MOTION TO DISMISS A COMPLAINT BASED SOLELY UPON THE SUFFICIENCY OF THE ALLEGATIONS OF THAT COMPLAINT, MAY A TRIAL OR APPELLATE COURT ASSUME AS TRUE FACTUAL MATTERS WHICH ARE CONTRARY TO THE ALLEGATIONS OF THAT COMPLAINT?

The first two sentences of the opinion of Judge Weick, (at Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, p. 3a) writing for the majority, indicates as follows:

> "The governor of Ohio called out the Ohio National Guard *to suppress a riot* in the City of Kent, Ohio, and *on the campus of Kent State University*. Two proclamations of the governor with respect thereto are appended to this opinion." (Emphasis added). (Note that the governor's proclamation regarding Kent was issued on May 5, 1970, the day *after* the shooting to *supplement* his previous proclamation of April 29, 1970, which did not mention Kent).

The concurring opinion of Judge O'Sullivan states (at Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, pp. 28a and 30a), that the pleadings involve:

> "Extravagant conclusional allegations and some dissembling . . . obvious contrivances to get into court without pretense of fair averment of causes of action . . . clearly contrived to hide rather than disclose the true background of the involved events . . . what had been going on at Kent State and its environs preceding the tragic deaths of these young people is

so widely and publicly known across the nation that this court *may take judicial notice of such events* . . . the pleadings make no mention of the burning down of the ROTC Building on the campus of the university and the continued threat to persons and property—all a part of a state of insurrection that preceded and *continued up to the very instant of the tragedy with which we deal.*" (Emphasis added).

The trial court's opinion of Judge Connell, dismissing these actions on the pleadings states in pertinent parts as follows (at Appendix, pp. 45-46):

> "The governor of Ohio had determined *in good faith* that on the basis of the facts as they appeared that riot and mob rule existed at Kent State University and this court cannot substitute its position for that of the Executive of the State of Ohio . . . The purpose of this Eleventh Amendment is to enable the sovereign to act without fear of lawsuit *in preventing mob action. Quelling riot* is the duty of the state, and its actions in preventing *an unrestrained mob bent on violating the rights of its citizens* is the act of the State of Ohio . . . The law provides that the use of the militia *in time of tumult* is the inherent and exclusive duty of the Executive alone . . . (Emphasis added).

It is incredible that such blatant factual assertions are advanced by federal magistrates without the benefit of applicable sworn testimony, relying presumably instead upon presentations of this incident in the news media. Not only are these assertions legally incorrect, but they are also factually incorrect. The fact that a lawsuit arises out of a controversial incident does not warrant a radical departure from the basic rule of law that on a motion to

dismiss a complaint the allegations of that complaint must be assumed as true. The real question presented here is whether in a matter as critical in our national life as the killing and wounding of students at Kent State University on May 4, 1970, there will be no legal avenue for redress because courts of review have made findings of fact based upon news media reports. This court has condemned the undue saturation of biased news media exposure in a community where a defendant is faced with a criminal charge. *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963). If juries should make their determinations based upon matters properly introduced into a court of law, without being influenced by wild media accounts, then so should judges. This case presents an outrageous record of judicial abuse, so shocking in magnitude that on this ground alone certiorari should be granted.

So that the extent of the abuse of the lower courts will be fully appreciated by this court (and at the risk of over-extending this petition for certiorari), petitioners would have this court note some of the salient conclusions drawn by the United States Department of Justice from the findings of the Federal Bureau of Investigation after an exhaustive inquiry, which conclusions were reprinted in part in the Senate Congressional Record, and which has been entirely reprinted elsewhere, as follows:

> (1) "Just prior to the time the Guard left its position on the practice field, members of Troop G (107th Armoured Cavalry) were ordered to kneel and aim their weapons at the students in the parking lot south of Prentice Hall. They did so, but did not fire. One person, however, probably an officer, at this point did fire a pistol in the air . . .

The Guard was then ordered to regroup and move back up the hill past Taylor Hall."

(2) "The crowd on top of the hill parted as the Guard advanced and allowed it to pass through, apparently without resistence. When the Guard reached the crest of Blanket Hill by the southeast corner of Taylor Hall at about 12:25 p.m., they faced the students following them and fired their weapons. Four students were killed and nine were wounded."

(3) "Six Guardsmen, including two sergeants and Captain Srp of Troop G stated pointedly that the lives of the members of the Guard were not in danger and that it was not a shooting situation."

(4) "We have some reason to believe that the claim by the National Guard that their lives were endangered by the students was fabricated subsequent to the event. The apparent volunteering by some Guardsmen of the fact that their lives were not in danger gives rise to some suspicions."

(5) "(One guardsman) admitted that his life was not in danger and that he fired indiscriminately into the crowd. He further stated that the Guardsmen had gotten together after the shooting and decided to fabricate the story that they were in danger of serious bodily harm or death from the students."

(6) "Also, a chaplain of Troop G spoke with many members of the National Guard and stated that they were unable to explain to him why they fired their weapons."

(7) "No verbal warning was given to the students immediately prior to the time the Guardsmen fired."

(8) "There was no request by any Guardsman that tear gas be used."

(9) "There was no request from any Guardsman for permission to fire his weapon."

(10) "The Guardsmen were not surrounded."

(11) "No Guardsman claims he was hit with rocks immediately prior to the firing."

(12) "There was no sniper."

(13) "The FBI has conducted an extensive search and has found nothing to indicate that any person other than a Guardsman fired a weapon."

(14) "At the time of the shooting, the National Guard clearly did not believe that they were being fired upon."

(15) "Each person who admits firing into the crowd has some degree of experience in riot control. None are novices."

(16) "A minimum of 54 shots were fired by a minimum of 29 of the 78 members of the National Guard at Taylor Hall in the space of approximately 11 seconds."

(17) "Five persons interviewed in Troop G, the group of Guardsmen closest to Taylor Hall, admit firing a total of eight shots into the crowd or at a specific student."

(18) "Some Guardsmen (unknown as yet) had to be physically restrained from continuing to fire their weapons."

(19) "Four students were killed, nine others were wounded, three seriously. Of the students who

were killed, Jeff Miller's body was found 85-90 yards from the Guard. Allison Krause fell about 110 yards away. William Schroeder and Sandy Scheuer were approximately 130 yards away from the Guard when they were shot."

(20) "Although both Miller and Krause had probably been in the front ranks of the demonstrators initially, neither was in a position to pose even a remote danger to the National Guard at the time of the firing. Sandy Scheuer, as best as we can determine, was on her way to a speech therapy class. We do not know whether Schroeder participated in any way in the confrontation that day."

(21) No person shot was closer than 20 yards from the guardsmen. One injured person was 37 yards away; another, 75 yards; another, 95 or 100 yards; another 110 yards, another 125 or 130 yards; another 160 yards, and the other, 245 or 250 yards.

(22) "Seven students were shot from the side and four were shot from the rear."

(23) "Of the 13 Kent State students shot, none, so far as we know, were associated with either the disruption in Kent on Friday night, May 1, 1970, or the burning of the ROTC building on Saturday, May 2, 1970."

(24) "As far as we have been able to determine, Schroeder, Scheuer, Cleary, MacKenzie, Russell and more were merely spectators to the confrontation."

In addition to the FBI investigation, the events at Kent State University on May 4, 1970, were extensively investigated by the President's Commission on Campus Unrest,

appointed by President Nixon on June 13, 1970. The Commission, in its report, found that the shootings at Kent were "unnecessary, unwarranted and inexcusable." Former United States Attorney General John Mitchell publicly stated his agreement with this factual conclusion of the President's Commission on Campus Unrest, commonly known as the Scranton Commission, after its chairman, Former Governor of Pennsylvania William Scranton.

How then can Judge O'Sullivan write as he did that the pleadings "make no mention of the burning down of the ROTC building on the campus of the university and the continued threats to persons and property—all a part of a state of insurrection that preceded and *continued up to the very instant of the tragedy with which we deal.*" (Emphasis added).

As Judge Celebrezze correctly noted in his dissent (at Scheuer Appendix, U.S. Sup. Ct. No. 72-914, p. 33a):

> "The majority opinion is nonetheless framed under the assumption that the violence and riotous conditions which, according to the media, may have prevailed on the Kent State Campus, have been established as proven facts for purposes of the present suits."

It should be apparent that what has occurred is a plain miscarriage of justice which has reached a posture which only this highest court can now rectify.

II. DOES THE ELEVENTH AMENDMENT BAR A DAMAGE ACTION BROUGHT AGAINST THE GOVERNOR OF OHIO, AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD IN THEIR INDIVIDUAL CAPACITIES WHILE ACTING UNDER COLOR OF STATE LAW FOR THE INTENTIONAL DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER SECTION ONE OF THE CIVIL RIGHTS ACT OF 1871, 17 STAT. 13, 42 U.S.C. §1983, WHICH NEITHER NAMES THE STATE OF OHIO AS A PARTY DEFENDANT, NOR SEEKS TO RECOVER ANY DAMAGES PAYABLE THROUGH THE TREASURY OF THE STATE OF OHIO OR THROUGH ANY PUBLIC FUNDS?

In his dissent, Judge Celebrezze notes as follows (at Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, p. 32a):

> "Indeed the majority's ad hoc application of the Eleventh Amendment would appear to bar all suits under 42 U.S.C. §1983, with its requirement that defendants thereunder be shown to have acted under color of state law."

Judge Celebrezze has correctly framed the issue. The opinions of the lower courts disregard the established holding of this court in *Ex Parte Young*, 209 U.S. 123 (1908), where it was held that the immunity of a state provided in the Eleventh Amendment did not extend to a state official charged with violating the Federal Constitutional Rights of citizens. Subsequent decisions have adumbrated this principle of law, establishing that where a suit for damages does not seek recovery against public funds or against the treasury of a state, but rather seeks re-

covery only against the individual state official, such action is a suit against the individual, and not a suit against the sovereign, within the meaning of the Eleventh Amendment. See e.g., *Georgia Railroad and Banking Co. v. Redwine*, 342 U.S. 299 (1952); *Ford Motor Co. v. Treasury Department of Indiana*, 323 U.S. 459 (1944). Federal circuit and district courts have rejected any such claim that the Eleventh Amendment extends to state officials against whom actions are brought analogous to the one now before this court. See e.g., *Sostre v. McGinnis*, 442 F.2d 178, 205 (2nd Cir. 1971); *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *American Federation of State, County and Municipal Employees v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *Board of Trustees of Arkansas A. & M. College v. Davis*, 396 F.2d 730 (8th Cir.), *cert. denied* 89 Sup. Ct. 401 (1968); *Bayer v. Chaloux*, 288 F. Supp. 366 (N.D. N.Y. 1968); *Scolnick v. Winston*, 219 F. Supp. 836, 840 (S.D. N.Y. 1963), affirmed 329 F.2d 716 (2nd Cir. 1964).

It would appear that Judge Weick attempted to extend the immunity of the Eleventh Amendment beyond its present scope, which basically limits the immunity to those actions seeking a damage recovery from a state treasury or from public funds. Judge Weick apparently would extend the Eleventh Amendment's sovereign immunity to actions against state executives which "would seriously interfere with public administration, would restrain the government from acting, and would compel it to act." (Opinion of Judge Weick, Scheuer Appendix, U.S. Sup. Ct. No. 72-914, p. 12a) Thus, the applicability of the Eleventh Amendment is to be determined by the "effect" of the suit on state officials. Where the "effect" would be too great, so as "to place a straight jacket on the state's chief executive in times of emergency so that he could not

freely exercise his discretion," the Eleventh Amendment's immunity bars such a suit.

If this extraordinary proposition is correct, then all actions under U.S.C. Title 42, §1983, would be potentially barred by the Eleventh Amendment. In actions under U.S.C. Title 42, §1983, where the defendant must have acted "under color of state law", it is obvious that most defendants are likely to be state officials. In some sense, every action under U.S.C. Title 42, §1983, "affects" a state, because a state is nothing more than those state officials who act for it. Thus, a suit against any state official is in some degree going to "affect" that state. The question raised then is whether U.S.C. Title 42, §1983 is unconstitutional because it violates the Eleventh Amendment. Who is to say when the state will be sufficiently "affected" by the lawsuit against state officials so that the Eleventh Amendment's immunity should apply? This reasoning, which radically departs from previous authorities of this court, effectively emasculates the Civil Rights Act of 1871, which was specifically designed by Congress to provide redress for violations of the rights of citizens under the Fourteenth Amendment. It is the very situation which arose at Kent where a peaceful gathering of students was violently and unlawfully broken up by the excessive use of force by state officials, that the Civil Rights Act of 1871 was designed to remedy. The officials and executives of a state should not "freely exercise their discretion" where such "freedom" amounts to a license to wantonly kill and maim innocent students. The Civil Rights Act of 1871 was designed to limit the free exercise of discretion by state officials, at least to bounds set by the Fourteenth Amendment. It would seem that the Eleventh Amendment is at minimum qualified by the subsequent passage of the Four-

teenth Amendment with respect to the rights of due process of law and equal protection of the laws.

The decision below disregards the established rulings of this court, and raises profound questions which command the review of this court.

III. DOES ANY DOCTRINE OF EXECUTIVE IMMUNITY BAR A DAMAGE ACTION AGAINST THE GOVERNOR OF OHIO AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD ACTING IN THEIR INDIVIDUAL CAPACITIES, INDIVIDUALLY AND IN CONSPIRACY, UNDER COLOR OF STATE LAW FOR THE INTENTIONAL DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER SECTION ONE OF THE CIVIL RIGHTS ACT OF 1871, 17 STAT. 13, 42 U.S.C. §1983?

Judge Weick reasoned in his majority opinion that "since the courts have granted themselves absolute immunity, it would seem incongruous for them *not to extend the same privilege to the executive.*" (Emphasis added). (Opinion of Judge Weick, Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, p. 12a). As Judge Celebrezze pointed out in his dissent, this "extension" amounts to "an ad hoc application of the Eleventh Amendment . . ." As the dissent further points out, the opinion of the majority "in effect constitutes judicial repeal of an Act of Congress . . ." (Opinion of Judge Celebrezze, Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, p. 32a).

Let there be no mistake about it, the majority opinion of Judge Weick unabashedly departs from established law. Judge Weick feels that there is no reason why the abso-

lute immunity possessed by courts should not be "extended" to the executive. Thus, the decision of the lower court compels review by this court, insofar as this departure flies in the teeth of numerous holdings to the contrary. See e.g., *Carter v. Carlson*, 447 F.2d 358, 365 (D.C. Cir. 1971), cert. granted in part sub nom. *District of Columbia v. Carter*, 40 U.S.L.W. 3314 (No. 71-564, Jan. 10, 1972); *Sostre v. McGinnis*, 442 F.2d 178, 205 n. 51 (2nd Cir. 1971 (en banc); *Jobson v. Henne*, 355 F.2d 129 (2nd Cir. 1965); *Birnbaum v. Trussel*, 347 F.2d 86 (5th Cir. 1965); *Roberts v. Williams*, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971), addendum 456 F.2d 834 (5th Cir. 1972); *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968); *Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972); *Meredith v. Allen County War Memorial Hospital Ass'n.*, 397 F.2d 33 (6th Cir. 1968); *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968).

The decision of the lower courts is contrary to the decision of this court in *Sterling v. Constantin*, 287 U.S. 378 (1932). There it was held that the actions of a state governor were subject to review where there was a claim that the action of the governor in calling out National Guard troops in Texas to seize and control privately owned oil wells in order to impose production restrictions was illegal. In *Moyer v. Peabody*, 212 U.S. 78 (1909) (also like *Sterling* involving a governor attempting to order actions of the National Guard), this court was not confronted with any claim that the governor's conduct was in bad faith, or that his conduct was not directed toward the quelling of the claimed insurrection. Both parties agreed that the arrest and detention of Moyer were undertaken in good faith in the face of an actual insurrection. Thus, the reliance upon *Moyer, supra*, by the lower court is incorrect,

because this case does not present allegations admitting any good faith by the governor of Ohio or other defendants, or admitting the appropriate use of force directed toward the quelling of an insurrection. The allegations of the complaint—though assumed otherwise by the reviewing courts—do not admit good faith or a reasonable necessity for quelling any mob, riot or violence. The only way that this case might be brought within the ambit of *Moyer, supra*, is by literally disregarding the allegations of the complaint, and by changing them to suit the facts "found" by the reviewing magistrates contrary to the allegations of the complaint. This is precisely what has taken place in the lower courts.

Thus, it is clear that the new "extension" heralded by the lower court requires review on the merits, since it so plainly flaunts the present law.

IV. WHERE CITIZENS OF PENNSYLVANIA AND NEW YORK BRING DAMAGE ACTIONS IN FEDERAL COURT AGAINST THE GOVERNOR OF OHIO AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD, THESE DEFENDANTS ALL BEING CITIZENS OF OHIO, FOR COMMITTING INDIVIDUALLY AND IN CONSPIRACY THE WANTON KILLING OF INNOCENT STUDENTS ON A COLLEGE CAMPUS, AND WHERE AN OHIO STATUTE (OHIO REVISED CODE §5923.37) SPECIFICALLY PROVIDES FOR LIABILITY UNDER SUCH CIRCUMSTANCES, DOES A FEDERAL COURT HAVE JURISDICTION BASED UPON THE DIVERSITY OF CITIZENSHIP OF THE PARTIES?

Judge Celebrezze in his dissent writes as follows (at Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, p. 68a):

> "Without having heard evidence respecting the allegations of intentional willful and wanton misconduct, the District Court could not properly dismiss the wrongful death actions as against these defendants-appellees.
>
> I therefore believe that the District Court erred in dismissing the wrongful death actions set forth in the Krause and Miller complaints, which were before the court under its original, diversity jurisdiction. These actions are not barred by the Eleventh Amendment."

Judge Celebrezze's reasoning is the only reasoning with respect to the diversity basis of jurisdiction, since neither Judge Weick nor Judge O'Sullivan dealt with the issue at all.

However, it would seem that there would be diversity jurisdiction where a state statute provides as does Ohio Revised Code §5923.37, as follows:

> "When a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area *unless the act is one of willful or wanton misconduct.*" (Emphasis added).

The allegations of the pleadings bring this action within Ohio Revised Code §5923.37. This statute supercedes and waives any immunity otherwise available to the State of Ohio. It creates a cause of action such as the one alleged in the pleadings in this case. The basis of jurisdiction in this instance is not premised upon the existence of a federal question, but rather is premised upon the existence of a state statute providing for redress in a given situation. Where there exists diversity of citizenship of the parties, an action may be brought in federal court upon a state claim. Such an action as in this case is not barred by the Eleventh Amendment, where the state law clearly provides for liability of individuals, namely "members" of the organized militia. This serves to emphasize how strained it is for the lower court to assert that these actions are being brought against the sovereign, and not against individuals. The state law itself provides for these actions in its own courts against individuals. The federal court has an obligation to recognize state law in this regard. Moreover, there is no state sovereign immunity which would immunize members of the organized militia from liability. This is not a suit against the State

of Ohio as an entity, claiming damages recoverable from the state treasury, as in *Krause, Admr. v. State of Ohio,* 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972). Moreover, to the extent that Ohio seeks to claim sovereign immunity (assuming *arguendo* that the present action were against the State of Ohio), the application of the doctrine of sovereign immunity is unconstitutional in that it violates the rights of these petitioners to due process of law and equal protection of the laws guaranteed in the Fourteenth Amendment. Cf. the dissenting opinion of Justice Lloyd Brown of the Ohio Supreme Court in *Krause Admr. v. State of Ohio, supra.*

For these reasons, the lower court should not have altogether disregarded the diversity basis of jurisdiction, and this court should review on the merits the issue raised by the action of the lower courts in this regard.

V. IS THE UNITED STATES A NECESSARY PARTY IN A DAMAGE ACTION BROUGHT AGAINST THE GOVERNOR OF OHIO AND AGAINST GENERALS AND OFFICERS OF THE OHIO NATIONAL GUARD IN THEIR INDIVIDUAL CAPACITIES ALLEGING THAT THESE DEFENDANTS, ACTING INDIVIDUALLY AND IN CONSPIRACY UNDER COLOR OF STATE LAW, COMMITTED INTENTIONAL DEPRIVATIONS OF CONSTITUTIONAL RIGHTS UNDER SECTION ONE OF THE CIVIL RIGHTS ACT OF 1871, 17 STAT. 13, 42 U.S.C. §1983?

Judge Weick, writing for the majority below, asserted as follows (at Scheuer Appendix, U.S. Sup. Ct. Case No. 72-914, p. 19a):

> "It would appear that the United States was a necessary party to the determination of the issues as it was involved in the training of the National Guard and their use of weaponry. Failure to join an indispensible party requires dismissal of the action, Rules 12(b) and 19, Fed. R. Civ. P. Any decision rendered by the District Court relative to the training and weaponry of the guard would require action to be taken by both state and federal governments. To require such action to be taken is beyond the jurisdiction of the court. The United States has not consented to be sued."

This holding of Judge Weick is erroneous. The United States is not a necessary party based upon the plain allegations of the complaint. Simply because the United States was "involved" in the training of the National Guard and their use of weaponry does not necessitate that the United States be named as a defendant. We are here

dealing with the alleged misconduct of state officials acting under color of state law. There is absolutely no allegation relating to involvement of federal officials. Moreover, as contended in the preceding section, with respect to the State of Ohio, any bar to this action premised upon the failure of the United States to consent to suit violates the due process and equal protection clauses of the Fourteenth Amendment.

Inasmuch as the lower court in part premised its holding on the necessity of the United States as a party defendant, a conclusion altogether unjustified by the allegations, this court should review the matter on its merits.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the U.S. Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS

(Filed November 17, 1972)

Nos. 71-1622-23-24

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1622

ARTHUR KRAUSE, Administrator of the Estate of ALLISON KRAUSE, deceased,
Plaintiff-Appellant,

v.

JAMES RHODES, Governor of the State of Ohio, *et al.*,
Defendants-Appellees.

No. 71-1623

ELAINE B. MILLER, Administratrix of the Estate of JEFFREY GLENN MILLER, deceased,
Plaintiff-Appellant,

v.

JAMES RHODES, individually and as Governor of the State of Ohio, *et al.*,
Defendants-Appellees.

No. 71-1624

SARAH SCHEUER, Administratrix of the Estate of SANDRA LEE SCHEUER, deceased,
Plaintiff-Appellant,

v.

JAMES RHODES, Governor of the State of Ohio, *et al.*,
Defendants-Appellees.

APPEALS FROM UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Note: The Opinion of the Court of Appeals is appended to the Petition for Writ of Certiorari in the case of Sarah Scheuer v. James Rhodes, et al., United States Supreme Court Case No. 72-914, at pp. 1a-69a, with permission of the Clerk of the United States Supreme Court is incorporated herein by reference.

JUDGMENT OF COURT OF APPEALS IN KRAUSE CASE

(Filed November 17, 1972)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1622

ARTHUR KRAUSE, Administrator of the estate of Allison Krause, deceased,
Plaintiff-Appellant,

v.

GOVERNOR JAMES RHODES, SYLVESTER DEL CORSO and ROBERT CANTERBURY,
Defendants-Appellees.

Before: WEICK and CELEBREZZE, Circuit Judges and O'SULLIVAN, Senior Circuit Judge

---

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendants-appellees recover from plaintiff-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ JAMES A. HIGGINS
Clerk

JUDGMENT OF COURT OF APPEALS IN MILLER CASE

(Filed November 17, 1972)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1623

ELAINE B. MILLER, Administratrix of the Estate of Jeffrey Glenn Miller, deceased,
Plaintiff-Appellant,

v.

JAMES RHODES, individually and as Governor of the State of Ohio, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY D. JONES, JOHN E. MARTIN, RAYMOND J. SPR, ALEXANDER STEVENSON and VARIOUS OFFICER AND ENLISTED MEN true names presently unknown, being members of G. Company, 107th Armored Cavalry Regiment and A Company, First Battalion, 145th Infantry Regiment of the Ohio National Guard, and Robert White,
Defendants-Appellees

Before: WEICK and CELEBREZZE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge

---

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendants-appellees recover from plaintiff-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ JAMES A. HIGGINS
Clerk

ORDER OF COURT OF APPEALS DENYING PETITION FOR REHEARING

(Filed January 3, 1973)

Nos. 71-1622 and -1623

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 71-1622

ARTHUR KRAUSE, Administrator of Estate of Allison Krause, Deceased,
Plaintiff-Appellant

vs

JAMES RHODES, Governor, et al,
Defendants-Appellees

No. 71-1623

ELAINE B. MILLER, Administratrix of Estate of Jeffrey Glenn Miller, Deceased,
Plaintiff-Appellant

vs

JAMES RHODES, etc., et al,
Defendants-Appellees

ORDER

Before WEICK and CELEBREZZE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

A majority of the active Judges of this Court having voted against an en banc hearing, the petition for rehearing was considered by the panel, and it is hereby denied.

Judges Edwards and Celebrezze voted in favor of an en banc hearing. Judge Celebrezze dissented from the order of the panel denying the petition for rehearing.

ENTERED BY ORDER OF THE COURT.

/s/ JAMES A. HIGGINS
Clerk

MEMORANDUM AND ORDER OF DISTRICT COURT

(Filed June 2, 1971)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE, Administrator of the Estate of ALLISON KRAUSE, deceased *Plaintiff,* v. GOVERNOR JAMES RHODES, *et al.*, *Defendants.*	Civil Action No. C 70-544
ELAINE B. MILLER, Administratrix of the estate of JEFFREY GLENN MILLER, deceased, *Plaintiff,* v. JAMES RHODES, *et al.*, *Defendants.*	Civil Action No. C 70-816
SARAH SCHEUER, Administratrix of the Estate of SANDRA LEE SCHEUER, deceased, *Plaintiff,* v. JAMES RHODES, *et al.*, *Defendants.*	Civil Action No. C 70-859

MEMORANDUM AND ORDER

CONNELL, *J.*

Before this court are defendants' motion to dismiss in the above-captioned cases. In *Krause v. Rhodes*, juris-

diction is predicated upon 42 U.S.C. 1983, for violation of Equal-Protection and Due Process guaranteed under the United States Constitution, and under 28 U.S.C. Sections 1331 and 1334.

This action maintains that "all defendants acted and conspired under color of statutes, ordinances, regulations, customs and usages of the State of Ohio", to violate the plaintiffs' rights to Equal Protection of the Law and Due Process of Law guaranteed under the United States Constitution."

The complaint of *Elaine B. Miller, Administratrix v. James Rhodes, et al.*, also alleges jurisdiction under 42 U.S.C. Section 1983 for seeking "redress for the deprivation under color of state law of the life of Jeffrey Glenn Miller, his rights, privileges, and immunities secured by the Constitution of the United States."

The action filed by *Sarah Scheuer v. James Rhodes, et al.*, alleges violation of 42 U.S.C. Section 1983 seeking "redress of deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States."

In reading the complaints in these three cases, the alleged incidents all took place at the same time under the same circumstances arising out of a confrontation between Ohio National Guard troops and students on the campus of Kent State University on May 4, 1970. In reading the complaint further, it is pointed out that all plaintiffs, except Sarah Scheuer, are residents of states other than Ohio and all defendants are residents of the State of Ohio. These cases, being exact in allegations, jurisdiction being predicated upon Section 1983 in all cases, the defendants being the same, with few inconsequential excep-

tions, and the events allegedly having taken place at the same time, this Court shall rule on all the motions to dismiss at this time in this memorandum and order.

The defendant, James Rhodes, Governor of the State of Ohio, maintains that in all three actions that this Court lacks jurisdiction over the defendant in his representative capacity as a public official and agent of the sovereign State of Ohio, since this action is essentially against the State of Ohio, and no waiver of its constitutional right to sovereign immunity has been granted. Further, Governor James Rhodes maintains that nowhere in the plaintiffs' complaint does an allegation appear that any negligent, wilful or wanton act was committed by Governor James Rhodes.

The defendants, Adjutant General Sylvester Del Corso and Brigadier General Robert Canterbury, both of the Ohio National Guard, motion to dismiss the complaints in the three above-captioned cases before this court, and Robert White, President of Kent State University seeks dismissal in two of the cases, C 70-816 and C 70-859; this defendant not having been named in C 70-544. These defendants maintain that they are sued in their representative capacities as public officials and agents of the sovereign State of Ohio, and this complaint being brought against them in their representative capacities in a suit against the State of Ohio, and that this State having not consented to the suit, sovereign immunity prevents the plaintiffs from bringing this action.

The defendants, Major Harry D. Jones, Captain Raymond J. Srp and Captain John E. Martin, and all officers and men in the Ohio National Guard, also move this court for a dismissal of the complaint in civil actions C 70-816 and C 70-859, maintaining that the court lacks jurisdiction

over the subject matter. These defendants claim that they are being sued in their representative capacities as military officers and agents of the sovereign State of Ohio, and that the complaint is one in which the State of Ohio is primarily concerned and the state not having waived sovereign immunity, the case must be dismissed.

The National Guard is authorized by Ohio law under Section 5923.01 et seq., of the Ohio Revised Code. The duties of the Governor with respect to the use of the state militia are expressed in Section 5923.21 of the Ohio Revised Code. This statute gives the Governor of Ohio the power to order the organized militia into service to:

> "aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia."

Further, Section 5923.22 of the Ohio Revised Code enables the Governor to order the

> "commanding officer of any regiment, battalion, company, troop or battery of the organized militia, to order his command or part thereof"

into service

> "to act in aid of the civil authorities"

when there is

> "tumult, riot, mob, or body of men acting together with intent to commit a felony, or to do or offer violence to person or property or by force or violence break or resist the laws of the state."

Section 5923.37 of the Ohio Revised Code provides immunity for members of the state militia

"when a member of the organized militia is ordered to duty by state authority during a time of public danger, he is not answerable in a civil suit for any act performed within the scope of his military duties at the scene of any disorder within said designated area unless the act is one of willful or wanton misconduct."

The Eleventh Amendment to the United States Constitution states that:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state."

The United States Supreme Court stated in *Missouri v. Fiske*, 290 U.S. 18, 25 (1933), that;

"The Eleventh Amendment is an explicit limitation of the judicial power of the United States . . . (quoting the Eleventh Amendment) . . . However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The 'entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given.' *Ex parte New York*, 256 U.S. 490, 497. Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States. *Hans v. Louisiana*, 134 U.S. 1, 10; *Palmer v. Ohio*, 248 U.S. 32, 34; *Duhne v. New Jersey*, 25 U.S. 311, 313, 314."

In the case of *Ford Motor Co. v. Department of Treasury of Indiana, et al.*, 323 U.S. 459 (1945), the Supreme Court again affirmed the law in *Fiske* and stated:

> "the express constitutional limitation denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent." (Citations omitted.)

In *Fitts v. McGhee*, 172 U.S. 516 (1898), the court reaffirmed the Eleventh Amendment prohibition of court interference with a state's sovereignty in a lawsuit brought by a citizen of the state. The court in the *Louisiana v. Jumel*, 107 U.S. 711 (1882), decision affirmed the sovereignty of a state in an unconsented lawsuit brought by a citizen of another state. These stated principles were reaffirmed by the Supreme Court in *Parden v. Terminal Railway of the Alabama State Docks Department, et al.*, 377 U.S. 184, 106 (1964). The Court in deciding whether a waiver of immunity had taken place stated clearly;

> "Nor is a state divested of its immunity on the mere ground that the case is one arising under the Constitution or laws of the United States."

In *Fowler v. United States*, 258 F.Supp. 638 (D.C. Cal. 1966), the court in interpreting sovereign immunity and Sections 1981, 1985, and 1988 prohibited any use of these sections as a basis of civil actions against public officers acting in their official capacities in good faith and in pursuance of federal or state law.

The case of *Tenny v. Brandhave*, 341 U.S. 367 (1951); involving a suit for damages brought in federal district court against the defendants; members of a state legislature fact finding committee. The Court in reviewing this action affirmed immunity of legislators acting within

their official capacities and affirmed the district court's dismissal of the complaint stating on page 377;

> "The claim of an unworthy purpose does not destroy the privilege . . . The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motive."

In *Kenny v. Killian*, 137 F. Supp. 571, 578 (W.D. Mich. 1955), the court also reviewing Section 1983 stated;

> "Congress by its enactment in the reconstruction period never intended that it should be used as a basis for civil actions for damages against judges, prosecuting attorneys, sheriffs, prison wardens, and other public officers acting in their official capacities in good faith and in pursuance of State law."

See also *Copley v. Sweet*, 133 F. Supp. 502, 509 (W.D. Mich. 1955).

The basis for this principle is to permit those whose position in government compels action to proceed without hesitation in the "constant dread of retaliation." See *Gregorie v. Biddle*, 177 F.2d 579, 581 (C.A. 2nd 1949), *Bradley v. Fisher*, 13 Wall. 334; *Randall v. Brigham*, 7 Wall. 523, *Spaulding v. Vilas*, 161 U.S. 483.

The policy for affording this immunity to public officials, is further stated in *Fowler*, *supra*, and *Gregorie*, *supra*, these cases being federal officials; the *Fowler* court said of page 646,

> "The well established principles of law summed up in the phrase, 'doctrine of sovereign immunity', stands as

> an unalterable and impregnable barrier between plaintiff and any injunctive relief against this defendant."

In *Gregorie, supra,* Judge L. Hand also stated on page 580;

> "The immunity is absolute and is grounded on principles of public policy."

In *Dunn v. Estes,* 117 Supp. 146 (1953), the district court held that Section 1983 does not destroy the immunity of public officials acting in the performance of their official duties. In *Fowler, supra,* 646, the court does not acknowledge "persons" as used in 42 U.S.C. Section 1983 as including a "state or its governmental subdivision, acting in its *sovereign,* as distinguished from its proprietary, capacity." The State while acting in its sovereign capacity is not included within the purview of Section 1983, Title 28 U.S.C. See *Hewitt v. City of Jacksonville,* 188 F.2d 423 (1951), cert. den. 342 U.S. 835 (1951). The state subdivisions, city and county, are not a "person" within the meaning of Section 1983 and are immune from liability. *Sires v. Cole,* 320 F.2d 877 (1963); *Monroe v. Pape,* 365 U.S. 167 (1960).

The plaintiffs may not avoid sovereign immunity by naming individuals rather than the political division itself. In *Great Northern Ins. Co. v. Read,* 328 U.S. 47, 51 (1943), the Supreme Court stated;

> "This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. (citations omitted) . . . A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment."

In *Ford Motor Co. v. Department of Treasury of Indiana, supra,* 464, the Court said:

"We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding."

The plaintiffs have cited cases where Section 1983 has been used as a basis for recovery against public officials. In *Monroe v. Pape, supra,* the Supreme Court permitted the use of Section 1983 as a basis for recovery against police officers for alleged violations of an individual's Fourteenth Amendment rights. The Court in this instance determined that sufficient allegations of "an officials abuse of his position" were presented.

In *Moyer v. Peabody,* 212 U.S. 78 (1909), Mr. Justice Holmes affirmed the order of a federal court in Colorado dismissing a lawsuit filed against the Governor of Colorado, the Adjutant General of the National Guard of that state, and a captain of a company of the militia, pursuant to R.S. Section 1979, 42 U.S.C. Section 1983, for alleged violations of the plaintiffs' Fourteenth Amendment rights. The governor in this case declared a county to be in a state of insurrection and called out the National Guard to suppress the trouble. In the course of controlling the outbreak, the plaintiff was arrested as a leader of the tumult and detained until he could be released with safety and turned over to the civil authorities and dealt with according to law. In upholding the Governor's actions, the High Court stated on page 85;

"So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief . . . Public danger warrants the substitution of executive process for judicial process. See

> *Keely v. Sanders*, 99 U.S. 441, 446 . . . It is enough that in our opinion the declaration does not disclose a 'suit authorized by law to be brought to redress the deprivation of any right secured by the Constitution of the United States.'" See *Dow v. Johnson*, 100 U.S. 158.

The members of the Ohio National Guard are agents of the State of Ohio while acting in their official capacities. This definition of the law was affirmed in *Maryland, et al. v. United States*, 38; U.S. 41 (1965). In this instance the Court defined the state militia as being state employees. U.S. Const., Art. I, Section 8, cl. 15 and 16.

Furthermore, the law of the State of Ohio, Section 2923.55 of the O.R.C., holds all law enforcement officers and members of the organized militia guiltless for their acts in suppressing riot when such order to cease and desist has been issued pursuant to O.R.C. 2923.51.

The State of Ohio has established Kent State University pursuant to Section 3341.01 of the Ohio Revised Code. The board of trustees of this university, with the advice and consent of the senate, are responsible for the governing of this institution pursuant to Section 3341.02 of the Ohio Revised Code. Authorization is given to the trustees of the institution pursuant to Ohio Revised Code, Section 3341.01 to;

> "Do all things necessary for the proper maintenance and successful and continuous operation of such universities."

Individuals may not maintain an action against a sovereign where consent has not been obtained. See *Palmer v. Ohio*, 248 U.S. 32 (1918) and also Article I, Section 16 of the Ohio Constitution as interpreted in *Randabough v. State*,

96 Ohio St. 513 (1916); *State ex rel. Williams* v. *Colonder*, 148 Ohio St. 188, (1947); *Wolfe v. Ohio State University Hospital*, 170 Ohio St. 49 (1959).

In *Corbean v. Xenia City Board of Education*, 366 F.2d 480 (C.A. 6th, 1966) the court affirmed the dismissal of a tort action brought in federal court against a local school board and stated;

> "It is the law of Ohio that a school board, when discharging a governmental function, is protected from tort liability by the doctrine of sovereign immunity. (citations omitted) . . . The decisions of the Ohio Courts in this litigation reaffirm the adherence to the doctrine of sovereign immunity, and found it applicable here. We follow Ohio law in this tort action unless such law offends federal law or the United States Constitution. *Erie R.R. v. Tomkins*, 304 U.S. 64, (1938); *Williams v. Kaiser*, 323 U.S. 471, (1945); *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, (1940)."

As stated in *Moyer, supra*, p. 83,

> "It is admitted as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of the fact . . ."

And in Justice Holmes comparison of a Governor to the Captain of a ship, the Court said on page 85;

> "But even in that case great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event. (citations omitted)."

The Eleventh Amendment to the United States Constitution prohibits a suit by an individual of another state against one of the United States.

The Governor of Ohio had determined in good faith that on the basis of the facts as they appeared that riot and mob rule existed at Kent State University and this Court cannot substitute its position for that of the executive of the State of Ohio.

The question of emergency compels the Governor to act decisively in suppressing this most dangerous activity, and the citizens of Ohio so demand it.

The purpose of this Eleventh Amendment is to enable the sovereign to act without fear of lawsuit in preventing mob action. Quelling riot is the duty of the state, and its actions in preventing an unrestrained mob bent on violating the rights of its citizens is the act of the State of Ohio.

This court is mindful of the circumstances where individual officials of a state or its subdivisions have abused their power under color or law giving rise to an action under Section 1983.

The existence of riot is determined by the Governor, and when so determined, the use of the militia in discharging the executive function of law enforcement is the inherent right and duty of the sovereign.

All the individuals of the militia acting in their duties pursuant to the orders of the Governor of the State of Ohio are acting within the sovereign's capacity to enforce the law, and the Eleventh Amendment right to immunity applies to each individual acting in this capacity.

This court holds that the actions of Governor James Rhodes in calling out the National Guard pursuant to the proclamation issued was the decision of the Executive, and this federal court is without jurisdiction to review.

The law provides that the use of the militia in time of tumult is the inherent and exclusive duty of the executive alone. In this instant case, there has been no recital of any claimed factual situation tending to substantiate the plaintiffs' allegations that an abuse of this duty existed, or that conspiracy actually existed in the slightest degree between any of the defendants so named in the complaints.

The Eleventh Amendment to the United States Constitution prohibits this court from exercising jurisdiction in this case and this court so finds.

All defendants, including President White, are sued in their official capacities and sovereign immunity so extends.

The above-captioned cases are dismissed as to all defendants.

The complaints in cases C 70-544, C 70-816 and C 70-859 are dismissed at plaintiffs' cost.

IT IS SO ORDERED.

/s/ JAMES C. CONNELL, Judge
United States District Court

DATED JUNE 2nd, 1971.

AMENDED COMPLAINT IN KRAUSE CASE

(Filed July 6, 1970)

Civil Action No. C 70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AMENDED COMPLAINT FOR DAMAGES UNDER UNDER U.S.C. TITLE 42, SECTION 1983, AND FOR WRONGFUL DEATH

A Jury Trial is Demanded

FIRST CAUSE OF ACTION

1. Plaintiff Arthur Krause is a citizen of the United States who resides in Churchill Borough, Pennsylvania, and is the only qualified, appointed and acting Administrator of the Estate of Allison Krause.

2. Allison Krause, plaintiff's decedent, was at all times hereinmentioned the daughter of plaintiff Arthur Krause, and plaintiff's decedent was at all times hereinmentioned a citizen of the United States, and was an enrolled student at Kent State University.

3. Defendant Governor James Rhodes at all times hereinmentioned was the Governor and Chief Executive of the State of Ohio and the Ohio National Guard was under his command, authority, and control.

4. At all times hereinmentioned defendant Sylvester Del Corso was the Adjutant General of the Ohio National Guard, which is the military force of the State of Ohio.

5. Defendant Robert Canterbury was at all times hereinmentioned the Brigadier General and Assistant Adjutant General of the Ohio National Guard and was in direct command and control of the national guardsmen in question at the time of the occurrence referred to hereinafter.

6. This action arises under United States Code Title 42, Section 1983, and under the United States Constitution, which guarantees to all citizens Equal Protection of the Laws and Due Process of Law.

7. At all times hereinmentioned all defendants acted and conspired under color of statutes, ordinances, regulations, customs and usages of the State of Ohio.

8. On or about May 4, 1970, defendants individually and jointly ordered units of the Ohio National Guard onto the Campus of Kent State University, which is an educational institution operated and controlled by the State of Ohio, and which is located in Portage County, in the State of Ohio.

9. Defendants ordered troops which they knew were equipped with guns loaded with live ammunition onto the Campus of Kent State University at a time when:

(a) Defendants knew there was no cause, or insufficient cause, for sending armed troops at said time into said place; and

(b) Defendants knew said troops were not properly trained in the correct and reasonable use of loaded weapons when in the presence of civilians not similarly armed; and

(c) Defendants knew that the presence of such troops, so improperly trained, and so armed, under the

circumstances created an unreasonable danger on the campus of Kent State University, creating an imminent risk of injury and death to all students then on the campus, including plaintiff's decedent, Allison Krause.

10. The ordering of these improperly trained and armed troops onto the Kent State Campus, on the part of these defendants in complete and utter indifference and disregard for the lives of students on the Kent State Campus, including plaintiff's decedent Allison Krause, constituted culpable, gross, wanton and reckless misconduct under the circumstances and arbitrarily, discriminatorily and capriciously deprived plaintiff and plaintiff's decedent of their rights to Equal Protection of the Laws and Due Process of Law guaranteed under the United States Constitution.

11. On the afternoon of May 4, 1970, a group of students gathered together on the campus of Kent State University. Plaintiff's decedent, Allison Krause, was present at or near the gathering of students but at no time did she engage in any provocation or form of violence towards any individual or national guardsman. At the time, the national guardsmen, as described above, under the command of defendant Robert Canterbury were present on the Campus. Suddenly and without warning and without cause or justification, National Guard troops fired live ammunition at a large group of students and people, intentionally, willfully, wantonly and maliciously disregarding the lives and safety of students, spectators, passers-by, and other individuals lawfully on the campus, including Allison Krause, who was wounded by a bullet fired by a weapon of a national guardsman, from which wound she eventually died, thereby depriving her of her

life without Due Process of Law, and in violation of her right to Equal Protection of the Laws. At no time did defendant Robert Canterbury take any action whatsoever to prevent his troops from so conducting themselves, and such failure under the circumstances then and there existing was an intentional act committed in willful, wanton, reckless and callous disregard and indifference for the lives of civilians present on the Campus of Kent State University, including plaintiff's decedent, Allison Krause.

12. All acts hereinmentioned were done individually and in conspiracy by these defendants and by other unknown persons with the specific intent of depriving plaintiff and plaintiff's decedent of their rights to Due Process of Law and to Equal Protection of the Laws, and these acts were all done by all defendants and other unknown persons under color of statutes, ordinances, regulations, customs and usages of the State of Ohio.

13. Plaintiff says that he and his family suffered great grief and distress as the result of the wrongful death of his daughter, who herself suffered conscious pain prior to her death, and that he and other beneficiaries had an interest in the life of the decedent, Allison Krause.

SECOND CAUSE OF ACTION

1. By this reference plaintiff incorporates all of the allegations of the First Cause of Action as thought those allegations were fully set forth herein at this point.

2. For this Second Cause of Action, plaintiff says that he is a citizen of the State of Pennsylvania, and that defendants are all citizens of the State of Ohio, and that this Court has jurisdiction of this Second Cause of Action by virtue of the diversity of citizenship of the parties.

3. Defendants ordered troops which they knew, or in the exercise of ordinary care should have known, were equipped with guns loaded with live ammunition onto the Campus of Kent State University at a time when:

(a) Defendants knew, or in the exercise of ordinary care should have known, that there was no cause, or insufficient cause, for sending armed troops at said time into said place; and

(b) Defendants knew, or in the exercise of ordinary care should have known, that said troops were not properly trained in the correct and reasonable use of loaded weapons when in the presence of civilians not similarly armed; and

(c) Defendants knew, or in the exercise of ordinary care should have known, that the presence of such troops, so improperly trained, and so armed, under the circumstances created an unreasonable danger on the Campus of Kent State University, creating an imminent risk of injury and death to all students then on the Campus, including plaintiff's decedent, Allison Krause.

4. The ordering of these improperly trained and armed troops onto the Kent State Campus on the part of these defendants was negligent and careless, and the negligence and carelessness of these defendants as hereinabove alleged directly and proximately caused the wrongful death of plaintiff's decedent, Allison Krause.

WHEREFORE, plaintiff prays for judgment on both Causes of Action against all defendants for compensatory damages in the sum of ONE MILLION DOLLARS ($1,000,000.00), together with the costs of this action.

WHEREFORE, plaintiff prays for judgment on both Causes of Action against all defendants for punitive damages in the sum of FIVE MILLION DOLLARS ($5,000,000.00), together with the costs of this action.

/s/ STEVEN A. SINDELL
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COMPLAINT IN MILLER CASE

(Filed August 24, 1970)

Civil Action No. C 70-816

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

COMPLAINT

Plaintiff Demands Trial by Jury

Plaintiff, ELAINE B. MILLER, by her attorney, JOSEPH KELNER and associate attorney, ABRAHAM D. SOAFER, for her complaint herein, alleges:

AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff is a citizen of the State of New York, residing at 261-71 Langston Avenue, Borough of Queens, City of New York and is the duly appointed administratrix of the estate of JEFFREY GLENN MILLER, plaintiff's son, who died on May 4, 1970 at the age of 20, by reason of the

actions of the defendants as hereinafter stated; plaintiff has been appointed administratrix of the estate of JEFFREY GLENN MILLER by the Surrogate's Court, Queens County, New York.

2. At all times herein mentioned, defendant RHODES was Governor of the State of Ohio and exercised certain powers and authority individually and as Governor of the State of Ohio and under color of the laws of the State of Ohio, as its agent, servant and employee.

3. At all times herein mentioned, the defendants, DEL CORSO, CANTERBURY, JONES, MARTIN, SRP, STEVENSON and the various officers and enlisted men of Troop G, G Company, 107th Armored Cavalry Regiment of the Ohio National Guard and A Company, First Battalion, 145th Infantry Regiment of the Ohio National Guard, were on active duty with the Ohio National Guard as officers and enlisted men therein and were acting under color of the laws of Ohio.

4. At all times herein mentioned, the defendant, WHITE, was President of Kent State University at Kent, Ohio and exercised his powers and authority in such employment and under color of the laws of Ohio.

5. At all times mentioned herein, JEFFREY GLENN MILLER was a full time student at Kent State University; and on May 4, 1970 the said JEFFREY GLENN MILLER was shot and killed by a bullet fired by one of the members of the Ohio National Guard in service on the campus at Kent State University; and at the time he was shot the said JEFFREY GLENN MILLER was not engaged in any riotous, aggressive, criminal, improper or provocative acts and was not contributorily negligent in causing his death.

6. This court has jurisdiction pursuant to Title 42, United States Code, Section 1983 and Title 28, United States Code, Sections 1331 and 1343 in that plaintiff's cause of action seeks redress for the deprivation under color of state law, of the life of JEFFREY GLENN MILLER, his rights, privileges and immunities secured by the Constitution of the United States, and it arises under Federal law, with the matter in controversy exceeding $10,000 exclusive of interest and costs.

7. At all times mentioned herein, Kent State University was a state university of Ohio, organized pursuant to the laws of Ohio and had its main campus in the City of Kent, Portage County, Ohio.

8. At all times mentioned herein on May 4, 1970 and prior thereto, the defendants, acting individually and in concert with each other and under color of the laws of the State of Ohio, subjected and caused the said JEFFREY GLENN MILLER to be subjected to the deprivation of his life, his rights, privileges and immunities secured by the Constitution and laws of the United States; that such deprivation was without due process of law in that, by reason of the defendants' actions on May 4, 1970 and prior thereto, plaintiff's decedent, JEFFREY GLENN MILLER, was shot and killed on May 4, 1970 by a bullet fired by one of the aforesaid National Guard members on duty on the campus of Kent State University; and the defendants intentionally, recklessly, willfully and wantonly engaged in the following acts among other things which caused or contributed to the causing of the deprivation alleged herein; that they used and fired live ammunition with the intent to kill JEFFREY GLENN MILLER and other students lawfully upon the said campus; that the officers of the said National Guard ordered the use of said live ammunition

and, upon information and belief, gave the orders to fire the same at the said time and place; that they thereby caused the death of the said JEFFREY GLENN MILLER; that by reason of the foregoing the plaintiff, individually and as administratrix of the estate of JEFFREY GLENN MILLER, and other members of his family, were damaged and are entitled to compensatory damages in the amount of two million ($2,000,000) dollars and punitive damages in the amount of ($2,000,000) dollars against all of the defendants.

AS AND FOR A SECOND CAUSE OF ACTION

9. Plaintiff repeats, reiterates and realleges each and every allegation hereinabove contained in paragraphs (1) through (8) with the same force and effect as if fully set forth herein.

10. That all of the defendants were reckless, careless and negligent in their failure to take precautions to avoid the occurrence of such shooting; in permitting the use of firearms under the existing circumstances; in permitting the said firearms to be loaded with live ammunition under circumstances not justifying such use; in authorizing and permitting the use of illegal and excessive force and violence in relation to the situation prevailing upon the Kent State campus at such time; in the failure to order and prevent troops of the Ohio National Guard from firing live ammunition at unarmed persons thereat under such or similar circumstances without legal justification; in failure to require the establishment and promulgation of proper rules, regulations and standards which would prohibit the unauthorized use and firing of firearms where the same was unjustified; in the promulgation of rules, regulations and training procedures applicable to civil disturbances

which were vague, indefinite and confusing and which authorized and permitted troops to use firearms within their own discretion and without proper standards, safeguards, orders or training prohibiting such improper use of firearms; in the failure to establish and conduct proper training procedures to prevent the happening of such an occurrence; in providing improper and insufficient training of troops for duty under such circumstances; in creating an unreasonable and imminent risk of injury and death to students upon the campus, including JEFFREY GLENN MILLER; and all of the defendants were otherwise reckless, careless and negligent.

11. On May 4, 1970 various officers and enlisted men intentionally and without just cause or provocation, fired intentionally at the said JEFFREY GLENN MILLER and others with intent to kill, causing the death of JEFFREY GLENN MILLER on the campus of Kent State University, in violation of the statutes and laws in such cases made and provided.

12. By reason of the foregoing the plaintiff, individually and as administratrix of the estate of JEFFREY GLENN MILLER, and other members of his family, were damaged and are entitled to compensatory damages in the amount of two million ($2,000,000) dollars and punitive damages in the amount of ($2,000,000) dollars against all of the defendants.

WHEREFORE, plaintiff prays for judgment against all of the defendants jointly and severally for compensatory damages in the amount of two million ($2,000,000) dollars and punitive damages in the amount of two million ($2,-

000,000) dollars, together with the costs and disbursements of this action.

/s/ STEVEN A. SINDELL
/s/ JOSEPH KELNER
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